SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1974.

No. 74-546

THE HONORABLE J. WILLIAM DITTER, JR.,
Petitioner,

v.

PHILADELPHIA NEWSPAPERS, INC. and SUSAN Q. STRANAHAN, UNITED STATES OF AMERICA, FREDERICK SCHIAVO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

SEYMOUR I. TOLL,
Counsel for Petitioner.

Suite 2000,
1845 Walnut Street,
Philadelphia, Pa. 19103

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The Honorable J. William Ditter respectfully prays that a writ of certiorari issue to review the judgment on rehearing order and *en banc* opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on 8 August 1974, and the orders entered by said Court on 22 August 1974, 23 August 1974 and 23 October 1974 amending the aforesaid *en banc* opinion.

OPINION BELOW.

The *en banc* opinion of the Court of Appeals for the Third Circuit is to be found in — F. 2d — (C. A. 3, 1974) and, with its amendments of 22 August 1974, 23 August 1974 and 23 October 1974, appears in the Appendix hereto. The aforesaid *en banc* opinion contains an opinion written by Circuit Judge Van Dusen in which Chief Judge Seitz and Circuit Judges Rosenn and Hunter joined; a concurring opinion written by Circuit Judge Adams in which Circuit Judges Gibbons and Garth joined; and a dissenting opinion written by Circuit Judge Aldisert in which Circuit Judge Weis joined.

JURISDICTION.

The judgment and order of the United States Court of Appeals for the Third Circuit were entered on 8 August 1974. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Is not the decision below an unauthorized promulgation of new District Court procedural rules which can only be valid through the exercise of this Court's supervisory power and due submission to Congress?

2. Does not the decision below significantly compromise Sixth Amendment guarantees of an impartial jury and fair trial by effectively denying District Judges the power to prohibit publicity prejudicial to the criminally accused?

FEDERAL CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED.

The texts of the Federal Constitutional Amendments and statutes involved are set out in the Appendix hereto.

STATEMENT OF THE CASE.

The Proceeding in the District Court.

On 1 June 1973 respondent Schiavo was indicted by a Federal Grand Jury on perjury charges growing out of the Grand Jury's investigation of the bombing death of one Martin Alan Hess, a Government informer. Shortly before his scheduled testimony in a narcotics trial Hess was killed when his automobile exploded.

On 3 October 1973 Schiavo's perjury trial by jury commenced in Philadelphia before petitioner who is a Judge of the United States District Court for the Eastern District of Pennsylvania. In his preliminary statement to the jury petitioner instructed it, "to avoid reading or listening or talking about any matter that might involve this case, however remote it might be." (J. A. p. 4).[1]

> "Remember, that you are sworn to try this defendant, to try this case both from the standpoint of the government and the standpoint of the defendant fairly and impartially and I don't want anything that you might read, that you might think would be important to creep into your knowledge or deliberations or your thoughts or anything of that nature." (J. A. p. 4).

The next morning respondent Philadelphia Newspapers, Inc.'s daily paper of general circulation, *The Philadelphia Inquirer* ("*The Inquirer*") published a story under the by-line of respondent Susan Q. Stranahan. It gave background about defendant Schiavo, stating in its opening sentence that he was "One of five men charged with conspiring to kill a government informer . . ." (J. A. p. 102). That afternoon, at defense counsel's request (J. A. pp. 22-

1. All subsequent "J. A." references are to the Joint Appendix below which has been certified as part of the record in this Court.

23), petitioner called members of the press to side bar and made this request:

> "Lady and gentlemen, the defendant in this case is charged with perjury. There is an article in this morning's Inquirer which points out that he was also charged with another crime.
>
> I would ask you, please, that if you feel that you must write about this case, write about this case and not about other cases. It makes it most difficult to carry on a criminal trial if this sort of thing happens, and I would ask each of you, please, to try to be aware of the problem with the Court and criminal defendants.
>
> I know I can't tell you what to write, but I would hope that you would be aware of the problems that you create, at least." (J. A. pp. 23-24).

The next morning, 5 October 1973, another article bearing respondent Stranahan's by-line was published in *The Inquirer*. It carried an account of the previous day's trial, repeated the paper's earlier statement regarding the conspiracy-to-murder indictment against Schiavo, and added that Schiavo was also charged "with first-degree murder in New Jersey" (J. A. p. 103).

At about 2:00 p.m. that afternoon petitioner met again with members of the news media covering the trial. Following an off-the-record discussion with them, petitioner stated:

> "I told them all that while they could print that which went on in the courtroom so far as this trial is concerned they were not to write nor were their papers to print matters that were not said here in the courtroom. . . . And specifically I told Miss Stranahan that she had in a story bylines that had been pointed out that

this defendant had been indicted in New Jersey and had been indicted for other offenses in this jurisdiction. I said that there was to be no repetition of that story or those facts and that if it were repeated I would consider it a matter of contempt of court and I would consider holding her liable for contempt and holding her editors liable for contempt.

Mr. Enoch [Associated Press reporter]: Would you agree that without the known connection between Mr. Schiavo and the Hess murder this trial seems to be very little without the——

The Court: I didn't say anything about your not printing that which is said here in the courtroom. I am talking about information that has not come out in the course of the trial and there have been many references to Martin Alan Hess in the course of this trial.

Mr. Enoch: How about information we can find in our libraries at the different papers?

The Court: If it hasn't come out here in this courtroom I would consider that contempt." (J. A. pp. 49-50).

Two hours later that afternoon, after the jury had been adjourned and departed for a three-day weekend, David H. Marion, Esq., counsel for respondent publisher of *The Inquirer* and respondent Stranahan, appeared in petitioner's courtroom. He indicated that he clearly understood the scope of petitioner's order respecting silence about the other crimes of which Schiavo was accused. He told petitioner:

". . . [W]e are advised that there was placed in the record today in this case an Order directed to the Philadelphia Inquirer, to Miss Stranahan particularly . . . that no reference be made to the fact that there are other indictments pending against Mr. Schiavo, the

> defendant in this case, in other jurisdictions which relate to the circumstances about which he is being prosecuted here." (J. A. p. 54).

Mr. Marion then moved petitioner to reconsider and vacate his silence order "on the ground that it is a classic prior restraint on the exercise of First Amendment rights." (J. A. p. 54). Following a colloquy between them, petitioner said:

> "All I am asking is that for one more day until this case is over you do not publish that the man is indicted somewhere else and I really do not think that is a bit unfair." (J. A. p. 58).

Immediately thereafter petitioner returned to his chambers for the first time that afternoon since he had entered his silence order, drafted, personally typed and entered a written order denying the motion to vacate and a motion for a stay.

Later that afternoon Mr. Marion filed a motion for a stay in the United States Court of Appeals for the Third Circuit and a Notice of Appeal in the District Court.

The next day—Saturday, 6 October 1973—*The Inquirer* and the *Philadelphia Daily News*, another paper of general circulation, ran stories repeating those previously published charges against Schiavo which were not involved in the trial before petitioner, and also reported that they had been ordered not to refer to those charges. The three-column headline in the *Daily News* published that day read: "Judge Curbs Press at Slay Trial" (J. A. pp. 108-109).

A three-day holiday weekend ensued, and on Tuesday, 9 October 1973, the Schiavo perjury trial resumed. Defense counsel moved twice that day for a mistrial based on the articles published on 6 October. Both motions were denied

(J. A. pp. 64-65, 100). Schiavo was convicted of perjury on 10 October 1973, and on 14 May 1974 petitioner denied Schiavo's motion for a new trial. Schiavo's appeal is presently pending in the Court of Appeals below.

The Proceeding in the Court of Appeals.

On 10 October 1973 the Court of Appeals below heard oral argument and granted the motion for a stay brought on by respondents Stranahan and the publisher of *The Inquirer*. These respondents pursued two courses in that Court: (1) an appeal from petitioner's denial of their request to vacate the silence order, and (2) a petition for a writ of mandamus and/or prohibition seeking to bar the enforcement of the silence order. The Court of Appeals consolidated the appeal and the petition.

Respondent Schiavo's appeal from his conviction was not involved in this proceeding in the Court of Appeals nor is it involved in the instant petition for a writ of certiorari. He took no part in this appeal below. As the issues were joined in the Court of Appeals, respondents Stranahan and her employer publisher, as well as *amici curiae* The New York Times Company and American Newspaper Publishers Association, pressed the appeal and the petition. Respondent United States of America appeared by its counsel in opposition to the appeal and petition.[2]

A three-judge panel initially heard argument in the Court of Appeals which then ordered *en banc* reargument. On 8 August 1974 the Court of Appeals issued its *en banc* opinion, entered judgment, reversed and remanded the respondents' appeal, and ordered their petition "denied as moot, in accordance with the opinion of this Court."

This petition for a writ of certiorari follows.

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2. The United States of America, as well as Schiavo, are designated respondents on the instant petition for a writ of certiorari solely to comply with that portion of Rules of Supreme Court 21.6 which states: "All parties other than the petitioner shall be respondents . . . ".

REASONS FOR GRANTING THE WRIT.

Introduction.

The just and effective administration of criminal law is an overarching concern of American society today. Because theirs is invariably the first and often the final responsibility for achieving and safeguarding this goal in our federal judicial system, District Judges in literally every federal trial court in the nation are in the most realistic sense deeply and immediately affected by the issues presented in this petition.

The dispute in the case at bar is, as the plurality opinion below correctly notes, "capable of repetition", *Southern Pacific Terminal Co. v. ICC*, 219 U. S. 498, 515 (1911). It is not overstating the matter to suggest that this repetition is inevitable as the public's concern about the administration of criminal justice intensifies. The quality of that justice is intimately related to two factors: (1) the trial judge's ability to perform his heavy responsibilities within a clear, workable and fair legal definition of those judicial obligations, and (2) the extent to which that definition can be applied by District Judges with substantive uniformity throughout the entire federal judicial system.

Petitioner respectfully submits that if the decision below is allowed to stand, the confusion and consequent needless additional litigation it will generate, the serious diminution of the District Judge's power to insure fair trial, and the disparate treatment of the same issue it will cause among the circuits can only compromise the goal of administering criminal law justly, effectively and uniformly throughout our federal courts.

I. The Decision Below Raises So Significant a Departure From the Accepted and Usual Role of a Court of Appeals as to Call for the Exercise of This Court's Power of Supervision.

The heart of the plurality's legal justification for its opinion appears in this language (p. 11):[3] ". . . we have concluded, *pursuant to our supervisory powers*, [fn.] that the oral silence order was procedurally deficient." (emphasis supplied). Having invoked that claim of supervisory powers, it then proceeds to lay down new rules imposing upon the District Court a set of obligations which are as unworkably abstract and rigidly formal as they are lacking in any authority to support their promulgation in this unprecedented manner.

The formalities involve the reduction of a silence order to writing, the specific statement of its terms, and its entry upon the District Court docket (p. 11). For none of these new requirements does the plurality opinion cite any statutory authority, any directions from the Supreme Court, or any decisional law. The only suggestions for justification are analogies (pp. 11, 12) the plurality seeks to draw to Rule 55 of the Federal Rules of Criminal Procedure requiring the docketing of "each order or judgment of the court", and Federal Rules of Civil Procedure 54 ("Judgment; Costs"), 53 ("Entry of Judgment"), 65(d) ("Injunctions . . . Form and Scope of Injunction of Restraining Order"), and 79(a) ("Books and Records Kept by the Clerk and Entries Therein . . . Civil Docket").

Putting aside the realistic root questions of how this new set of requirements actually does anything to advance

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3. All subsequent references to pages in the *en banc* opinion below are to the pagination as it appears in the text annexed to this petition.

either the cause of "an impartial jury" which the District Judge is bound to vouchsafe under the Sixth Amendment, or the values in the First Amendment, it appears that all of these new rules are to be applied only to:

> ". . . such an order which is immediately appealable as a final decision in a collateral matter, and where such order binds non-parties for a continuing period of time . . ." (p. 11).

When a District Judge is faced with the real and present possibility, as petitioner was here, that accounts such as these in the media could prejudice a jury in the midst of a trial, who is to make the determination (let alone how and when it is to be made) of whether or not a proposed order "is immediately appealable as a final decision in a collateral matter?"

The often difficult legal problem of making this determination is illustrated by the very appeal involved here. If the Court of Appeals went through the understandably challenging and time-consuming inquiry of making that determination in this very case, it is reasonably foreseeable that the same kind of difficulty can be anticipated in the District Court, whether the obligation fall upon counsel or the District Judge or both.

Furthermore, what is now imposed upon the District Courts in the Third Circuit is a set of rules which are so vague as to invite a new layer of rules covering, for example, time limitations on hearing notices and definitions of procedures. Beyond that, they show no regard for the gap between notice of hearing and the order during which the most adverse kind of publicity can occur.

But even if this new group of rules served constitutional values, and were in fact genuinely workable, we submit that in the clear statutory scheme of our federal

judiciary, the Court of Appeals was without authority to issue such rules in the exercise of its "supervisory powers". In fact and in law, on such subjects as this, Courts of Appeals are without such power.

It is clear even from the concurring opinion below that the invocation of such assumed power was unsound. Writing for the concurring Circuit Judges, Judge Adams said:

> "I would not invoke our supervisory powers, assuming such powers may be invoked in the context of the dispute presented here, to require the district courts to follow certain procedures . . ." (p. 14).

On three other occasions the concurring opinion again questions the assumption that there is such power in the court on this issue. It calls such reliance "disquieting" (p. 19) and rejects reliance "in this case on the rubric of 'supervising powers.'" (p. 19). See also p. 27.

The new rules which District Judges in the Third Circuit are now expected to follow are legally unauthorized, and the dissent below accurately discloses that. Writing for the minority, Judge Aldisert states:

> "But this court has no power to prescribe procedural rules for the governance of the district courts. That power is vested, by statute, in the Supreme Court. 18 U. S. C. §§ 3771, 3772; 28 U. S. C. §§ 2072, 2075. At the very most, the suggestions of the plurality should have been directed to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, 28 U. S. C. § 331, instead of incorporating them by judicial fiat in an in banc opinion (p. 28) "

An examination of these authorities thoroughly documents the existence of that power in this Court, and not

in Courts of Appeals. The opening paragraph of 28 U. S. C. § 2072 speaks unambiguously regarding the civil rule-making power for District Courts. It is in this Court. Indeed, even that power is subject to a strict statutory scheme set out in this provision of the Code which renders District Court civil rules promulgated by this Court subject to submission to Congress before they may become effective.

The same distribution of rule-making power applies to criminal matters. 18 U. S. C. § 3771, § 3772. Thus, whether this set of rules be considered civil or criminal, the Court of Appeals had no authority to promulgate them.

The dissent's observation that the Judicial Conference of the United States might be the appropriate forum for "the suggestions of the plurality" squares precisely with the statutory purpose of the Conference. 28 U. S. C. § 331. That statute's statement of the purpose of the Conference suggests a powerful reason for the grant of the writ on this ground alone. It charges the Conference with responsibility for surveying the federal courts and submitting suggestions to them "*in the interest of uniformity* and expedition of business." (Emphasis supplied.)

In terms of judicial administration, the promulgation of these new rules runs directly afoul of the principle of uniformity throughout the federal system. Litigants, counsel, media, and District Court Judges participate at their respective perils in a judicial process where a set of rules on an extremely serious and sensitive subject involving the balance between a free press and the integrity of the criminal trial applies in one circuit but not in any other.

The principle of uniformity exists not for the sake of empty consistency, but to guarantee that citizens will

find justice of equal quality given in every federal court in the nation. It is a concept of essential fairness, the same concept which the dissent in the Court of Appeals also found violated when the decision below "reversed [the trial court] for failing to follow in October, 1973, rules which were not conceived until August, 1974." (p. 29). *Fisher v. Volz*, 496 F. 2d 333, 350-351 (C. A. 3, 1974).

II. The Decision Below Has Substantially Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court. As It Stands, the Decision Disserves "the Most Fundamental of All Freedoms", the Right to a Fair Trial.

This case presents an issue of a magnitude and significance such that we respectfully submit it may fairly be regarded as this Court viewed *Linkletter v. Walker*, 381 U. S. 618 (1965): "we granted certiorari in order to settle what has become a most troublesome question in the administration of justice" (at 381 U. S. 620).

The nature of modern technology with its power of massive and near instantaneous communication places the news media in an unprecedented situation today:

> ". . . the potential of the news media to influence the outcome of court proceedings, long recognized as a likelihood, was finally seen to be more than theoretical."

United States v. Dickinson, 465 F. 2d 496 (C. A. 5, 1972), cert. denied, 414 U. S. 979 (1973).

In addition, no era in American history has witnessed such understandably widespread concern about crime as the age we live in. The media's capacity to reach masses of such a fearful public almost instantaneously presents

a situation fraught with the most serious challenges to criminal trial by impartial jury. This Court has increasingly recognized that news media now have the very real power to prejudice a criminal defendant's right to a fair trial. *Marshall v. United States,* 360 U. S. 310 (1959); *Irvin v. Dowd,* 366 U. S. 717 (1961); *Rideau v. Louisiana,* 373 U. S. 723 (1963).

It was against this background, as well as from a due regard for the dictates of the First Amendment, that petitioner entered the silence order of 5 October 1973. Without in any way desiring or attempting to restrict the media's freedom to report all the events which unfolded at Schiavo's perjury trial, petitioner nonetheless had a fundamental obligation, shared by every District Judge in the nation, to insure that a criminal defendant before him receives what the Sixth Amendment guarantees, a fair trial by an impartial jury. By 1966 this Court had spoken clearly about that obligation to protect the criminal defendant from the prejudicial effect of a pervasive press", assuring that "the balance is never weighed against the accused." *Sheppard v. Maxwell,* 384 U. S. 333, 362 (1966).

Unlike the real and present danger which publication of the other charges against Schiavo posed to his right to an impartial jury, neither the plurality and concurring opinions, nor respondent publisher and respondent Stranahan have yet suggested in any realistic terms just how their First Amendment rights were in fact "chilled". Nor do we yet know just how the exercise of those rights would have actually been hobbled had they refrained (as some media did) from publishing such prejudicial material for the very brief interlude petitioner requested. Unlike prior restraints against the media's criticism of government, for example, there is simply no discernible vindication of the First Amendment to be found in respondents' conduct. In

fact, *The Inquirer* republished previously published facts that this accused, on trial for perjury before a jury, was elsewhere accused of murder and conspiracy to murder.

If it be argued that such republication serves some abstract concept of the public's right to information (even previously published information), it is not the law that all other constitutional safeguards—especially those of the Sixth Amendment—must be compromised or destroyed to serve such an abstraction. As Mr. Justice Jackson has said, "Newspapers, in the enjoyment of their constitutional rights may not deprive accused persons of their right to fair trial." *Shepherd v. Florida,* 341 U. S. 50, 53 (1951). Despite the invocation of "freedom of the press" as a universal solvent for constitutional problems such as the one at bar, the law does impose limitations on that freedom. *Branzburg v. Hayes,* 408 U. S. 665, 683-685 (1972). This Court has announced in *Estes v. Texas,* 381 U. S. 532, 540-541 (1965):

> "We have always held that the atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs."

See also *United States v. Tijerina,* 412 F. 2d 661 (C. A. 10, 1969), cert. denied 396 U. S. 867 (1969).

As it stands now, in the name of procedural reform the plurality opinion below has, without authority, actually created new obstacles in the path of District Judges who strive to maintain that most fundamental of freedoms. The facts at bar point this up very clearly. While rejecting the plurality's attempted enactment of procedural rules by Court of Appeals fiat, the concurring opinion works the same result in the name of the First Amendment (pp. 14, 24, 25).

Both this record and the dissent below accurately demonstrate that petitioner's action was "an affirmative effort to vindicate the Sixth Amendment right of a defendant being tried in a criminal case before him." (p. 28). The demonstrable reality is also that the meaning of the silence order was perfectly clear and specific. Respondents fully understood the reason which motivated it. Such realities deserve the kind of consideration they failed to receive below. See *Government of Virgin Islands v. Brodhurst*, 285 F. Supp. 831 (D. C. V. I., 1968).

And last, but hardly least, as the dissent notes, "What is here is not prior restraint . . . but a ban on the repetition of previously published information for *'one more day'*, until the trial concluded." (p. 44). Put in that accurate context, there is every reason to conclude that in a scale of competing First and Sixth Amendment values, those of the Sixth Amendment clearly deserved the highest consideration. To conclude otherwise, as the opinion below does, is to allow the abstraction of a free press rather than the facts at bar to destroy the actual integrity of trial by jury, and to do so without the accountability which the law would demand of any other party who caused such a result.

What is actually involved here is a problem posed by great numbers of criminal cases throughout the federal judiciary. The fair and effective administration of the trials of such cases is directly tied to the District Judge's power to comply with the dictates of *Sheppard v. Maxwell, supra* by prohibiting conduct which prejudices juries. As it stands, the decision below has, without legal justification and for all practical purposes, denied trial judges an essential element of that power. Such a significant decision on so important a question of federal law deserves review in this Court.

CONCLUSION.

For these reasons, a writ of certiorari should issue to review the judgment on rehearing, order and *en banc* opinion of the Court of Appeals for the Third Circuit.

Respectfully submitted,

SEYMOUR I. TOLL,
Suite 2000,
1845 Walnut Street,
Philadelphia, Pa. 19103
Counsel for Petitioner.